REMARKS

Applicant has carefully reviewed the final office action mailed March 8, 2006 and offers the following remarks.

Claims 1-6, 9-14, 17-22, 26, and 27 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Ricci in view of Ferguson et al. (hereinafter "Ferguson"). Further, Claims 7, 8, 15, 16, and 23-25 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Ricci in view of Ferguson as applied to claims 1, 9, and 17, and further in view of Applicant's admission of the prior art. Applicant respectfully traverses. To establish *prima facie* obviousness, the Patent Office must show where each and every element of the claim is taught or suggested in the combination of references. MPEP § 2143.03.

The independent claims 1, 9, 17, 25, and 26 all recite "charging a fee based on a quantity of content served. . ." or some close analog to this element. The "quantity of content" corresponds to the actual amount of data being served. As an example, the Applicant's Specification provides that "a sliding-fee scale may be used to charge users based on the number of gigabytes, e.g., $30 for 1 gigabyte, $50 for 2 gigabytes, $90 for 5 gigabytes, and $150 for 10 gigabytes . . ." (Specification, page 16, lines 9-12). The Patent Office asserts that Ricci teaches charging based on quantity of content, at paragraph 0053. Paragraph 0053 states in full: "[0053] The server also can include a royalty database. The royalty database includes the costs of licensing the digital media, the limits of the license (i.e., duration, number of uses) and relates the royalties to the recipients database to track which recipients have licensed which digital media." The Patent Office reasons that Ricci's counting the number of uses is the same as Applicant's monitoring and tracking the quantity of content served. This assertion is unfounded.

To charge based on content would require monitoring the quantity of the content served, not just how many times a file is served. Ricci does not teach or suggest monitoring the quantity of the content served. As is clear from paragraphs 22, 27, and 31, Ricci is focused on collecting the appropriate royalties for downloading files associated with copyrighted works. Ricci provides a technique to collect royalties per use, but fails to disclose a technique to monitor the quantity of content served. The reason Ricci is not concerned about the quantity of content served is that royalties for copyrighted works are not based on the quantity of content, but are instead based on use of the content. As such, Ricci monitors use and has no need to monitor the quantity of content served.

Further, different files will be different sizes, and Ricci makes no differentiation between files of different size. However, use of different sized files of similar content type result in the same fees. Just because a file can be downloaded multiple times, does not indicate that quantity of content, or size, of the file is ever a factor. In short, charging based on the number of downloads is very different than charging based on the quantity of content served.

Ricci fails to teach or suggest charging based on the quantity of the content served. Nothing in Ferguson or the admitted prior art cures the deficiencies of Ricci. Since the references individually do not teach or suggest the claim element of charging based on quantity of content served, the combination of references cannot teach or suggest the claim element; thus, the Patent Office has not established obviousness for independent claims 1, 9, 17, 25, and 26. The dependent claims 2-8, 10-16, 18-24, and 27 further define the patentable subject matter of their respective independent claims.

Claims 1-27 were also provisionally rejected under the judicially created doctrine of obviousness type double patenting. As this is a provisional rejection and no patent has matured in either case, it is premature to provide a terminal disclaimer or otherwise substantively address this provisional rejection. In the event that one or the other application matures into a patent, Applicant will address this issue at that time.

The present application is now in condition for allowance and such action is respectfully requested. The Examiner is encouraged to contact Applicant's representative regarding any remaining issues in an effort to expedite allowance and issuance of the present application.

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